

**STATE OF INDIANA
DEPARTMENT OF STATE REVENUE**

IN REGARDS TO THE MATTER OF:

**WESTWOOD COUNTRY CLUB OF SPEEDWAY, INC.
A/K/A WESTWOOD RECREATION CLUB
DOCKET NO. 29-2004-0108**

**FINDINGS OF FACT, CONCLUSIONS OF
LAW AND PROPOSED DEPARTMENTAL ORDER**

An administrative hearing was held on Tuesday, May 11, 2004 in the office of the Indiana Department of State Revenue, 100 N. Senate Avenue, Room N248, Indianapolis, Indiana 46204 before Bruce R. Kolb, Administrative Law Judge acting on behalf of and under the authority of the Commissioner of the Indiana Department of State Revenue.

Petitioner, Westwood Country Club of Speedway, Inc., was represented by William J. Wood of Wood, Tuohy, Gleason, Mercer, & Herrin, Bank One Center Tower, 111 Monument Circle, Suite 3400, P.O. Box 44942, Indianapolis, Indiana 46244-0942. Attorney Doug Klitzke appeared on behalf of the Indiana Department of State Revenue.

The Petitioner was allowed to submit additional exhibits for the Department's review subsequent to the hearing. The Department did not have any objections to the two exhibits and therefore they were admitted as Petitioner's Exhibits G and H.

A hearing was conducted pursuant to IC 4-21.5 et seq., evidence was submitted, and testimony given. The Department maintains a record of the proceedings. Being duly advised and having considered the entire record, the Administrative Law Judge makes the following Findings of Fact, Conclusions of Law, and Proposed Departmental Order.

REASON FOR HEARING

Petitioner was the subject of an investigation conducted on December 22, 2003 by the Criminal Investigation Division of the Indiana Department of Revenue. The Department issued a letter dated March 10, 2004, in which Petitioner's bingo license was suspended for two (2) years, and Petitioner was assessed civil penalties in the amount of seven thousand five hundred dollars (\$7,500). The Petitioner protested in a timely manner.

FINDINGS OF FACTS

- 1) The Criminal Investigation Division of the Indiana Department of Revenue conducted an investigation of Petitioner. (Record at 7).
- 2) During the Department's investigation, it was determined that the Petitioner did not list Kenneth Magee as an operator.

- 3) "The Club's accountant, Mr. Heze Clark, filled out the initial bingo application forms. Since then Ms. Christoph [Club manager] has died of cancer and Mr. Shaw [Club president] is suffering from senility and is no longer the Club president. Mr. Shaw and Ms. Christoph conducted an operation with no financial records transferring from one set of officers to the next. Mr. Magee became more interested in the Club's affairs as a result of these two occurrences and began filling out spreadsheets and other membership reports to assist the officers in keeping better records of the Club's financial position, and total revenue, including revenue from Club activities and a spreadsheet showing the bingo operation. At no time did Mr. Magee participate in the running of a gaming event....[E]ach year the annual licensing reports were simply filled out based on the prior year information of ownership, as when the original bingo application was made. Mr. Nichols did not advert to the fact that the Club had previously deeded its facilities to the LLC to cover the LLC's investment with a lease and repurchase agreement. Mr. Nichols simply continued the same erroneous filing showing...the Club still owned the property."(Page 2-3 of Petitioner's Pre-Hearing Brief).
- 4) When the Petitioner submitted its CG-2R (Annual Bingo Renewal Application) in October of 2002 it indicated that it owned the facility where the bingo operation was conducted. (Department's Exhibit 1).
- 5) For the license renewal periods ending October 2003, the Petitioner indicated on its Form CG-2R that it owned the bingo facilities. (Department's Exhibit 2).
- 6) In the year 1997 the Petitioner was facing foreclosure. It owed \$108,000 in operating expenses which included \$53,000 in back taxes. The first mortgage, held by National City Bank, including late fees amounted to \$218,000. (Page 1 of Petitioner's Pre-Hearing Brief).
- 7) In January of 1998 seventeen members of Petitioner's organization lent Petitioner \$30,000. (Page 1 of Petitioner's Pre-Hearing Brief).
- 8) Petitioner began charity gaming operations in 1999. (Page 2-3 of Petitioner's Pre-Hearing Brief).
- 9) In 2001, Petitioner faced foreclosure again. Mr. Magee and five other members of Petitioner's organization loaned Petitioner \$460,000. Of this amount, Mr. Magee personally loaned Petitioner \$25,000 and his family trust loaned Petitioner \$151,000. (Page 1-2 of Petitioner's Pre-Hearing Brief).
- 10) A Warranty Deed dated June 11, 2001 was entered into between the Petitioner (Grantor) and Kenneth E. Magee Trustee of the B&N Revocable Trust (Grantee). (Petitioner's Exhibit A).
- 11) The Petitioner entered into an agreement in lieu of foreclosure with B & N Revocable Trust (B&N) on June 22, 2001. The agreement provides that the Petitioner would convey its real estate to B&N subject to the foreclosure judgment, the mortgages, and the delinquent taxes. (Department's Exhibit 5).
- 12) The June 22, 2001 agreement with B&N in lieu of foreclosure also states that B&N consented to the operation of bingo by the Petitioner without additional rent so long as the Petitioner has a valid license, but the lease was not conditioned on the continued validity of a license. (Department's Exhibit 5).

- 13) B&N additionally agreed to lease back the premises to Petitioner with an option to purchase. (Department's Exhibit 5).
- 14) On June 22, 2001 the Petitioner also entered into a lease with Westwood Club LLC. The lease requires that the lessee (Petitioner) pay the base rental of \$2,000 per month in advance, and all property taxes, assessment and user fees on the property and improvements. The Petitioner must pay all premiums for property and casualty insurance in connection with the premises, and the cost of all maintenance, upkeep, repairs and replacement. (Department's Exhibit 6).
- 15) Petitioner argues that the \$2,000 per month payment plus taxes and insurance are attributable to the ownership of the business operation and not to the bingo operation. (Record at 31).
- 16) The lease entered into by the Petitioner does not make a distinction between the amount of rent paid for the business operation and the portion that may be attributable to the operation of its gaming activities. (Department's Exhibit #6).
- 17) A Special Warranty Deed was entered into on August 6, 2001 between Kenneth E. Magee as Trustee of the B&N Revocable Trust (Grantor) and Westwood Club LLC (Grantee). (Department's Exhibit G).
- 18) On December 11, 2003 the Petitioner entered into a Memorandum of Understanding (MOU) with Westwood Club LLC. The MOU detailed that conditions under which the Petitioner was entitled to buy back the property in question at the expiration of the lease on June 22, 2006. (Petitioner's Exhibit H).
- 19) The spreadsheets generated by Mr. Magee, actually include more information than is required on the Department's CG-NSR (Indiana Department of Revenue Charity Gaming Nightly Summary Report); however, the spreadsheets were for his own edification as an investor who had loaned Petitioner a substantial amount of money. (Petitioner's Exhibit C).
- 20) George W. Nichols was not a resident of Marion County during the time periods in question (Page 3 of Petitioner's Pre-Hearing Brief and Record at 52). The Department in its letter of March 10, 2004, merely points out this fact, and does not impose any civil penalties or suspensions as a result. Therefore, this issue is moot.
- 21) On March 10, 2004, the Petitioner's bingo license was suspended for two (2) years, and assessed civil penalties in the amount of seven thousand five hundred dollars (\$7,500).

STATEMENT OF LAW

- 1) The Department's hearings are governed by IC 4-21.5 exclusively. (See IC 4-32-8-5. *As added by P.L.188-2003, SEC.3.*)
- 2) Pursuant to 45 IAC 18-8-4, the burden of proving that the Department's findings are incorrect rests with the individual or organization against which the department's findings are made. The department's investigation

establishes a prima facie presumption of the validity of the department's findings.

- 3) Pursuant to 45 IAC 18-1-30, the term "Operator" means, "a member of a qualified organization who is:
 - (1) an Indiana resident;
 - (2) in good standing with the department; and
 - (3) in addition to the forgoing [*sic.*, *foregoing*], the following individuals are also operators:
 - (A) A bartender licensed with the alcohol and tobacco commission if the bartender sells only pull-tabs, tip boards, or punchboards.
 - (B) Any person who accounts for money received at the charity gaming event.
 - (C) Any person who keeps records of the charity gaming event.
 - (D) Any person who announces the letter-number combination at a bingo event.

(Department of State Revenue; 45 IAC 18-1-30; filed Feb 28, 2003, 2:16 p.m.: 26 IR 2304)
- 4) Pursuant to 45 IAC 18-3-2(e), "Rent paid for leased facilities cannot exceed two hundred dollars (\$200) per day and cannot be based on the revenue generated by the event. Additional moneys shall not be paid for utilities, janitorial expenses, security, set up and tear down expenses, or any other expenses. These expenses must be included in the two hundred dollar (\$200) rent limitation per day. The facility cannot be leased for more than two (2) days in a calendar week. A facility is owned when an organization holds a fee simple estate in the facility. A facility is leased when an organization enters into a written agreement to occupy the facility which gives rise to the relationship of lessor and lessee, regardless of the terms of the lease. The lease of a facility for an allowable event must be in writing.
- 5) IC 4-32-9-20 states, "Except as provided in subsection (d), if facilities are leased for an allowable event, the rent may not:
 - (1) be based in whole or in part on the revenue generated from the event; or
 - (2) exceed two hundred dollars (\$200) per day.
 - (b) A facility may not be rented for more than three (3) days during a calendar week for an allowable event.
 - (c) If personal property is leased for an allowable event, the rent may not be based in whole or in part on the revenue generated from the event.
 - (d) If a qualified organization conducts an allowable event in conjunction with or at the same facility where the qualified organization or its affiliate is having a convention or other meeting of its membership, facility rent for the allowable event may exceed two hundred dollars (\$200) per day. A qualified organization may conduct only one (1) allowable event under this subsection in a calendar year.

- 6) A qualified organization that rents a facility for multiple functions including charity gaming may still only pay \$200 per day. The yearly rental may not exceed \$73,000 (\$200 x 365 days).
- 7) A qualified organization that rents a facility for charity gaming three (3) nights a week may still only pay \$200 per day. The yearly rental may not exceed \$31,200 (\$200 x 52 x 3 days).
- 8) IC 4-21.5-3-25(b) provides in pertinent part, "The administrative law judge shall regulate the course of the proceedings in conformity with any prehearing order and in an informal manner without recourse to the technical, common law rules of evidence applicable to civil actions in the courts..."
- 9) IC 4-21.5-2-26(a) states, "The administrative law judge may admit hearsay evidence. If not objected to, the hearsay evidence may form the basis for an order. However, if the evidence is properly objected to and does not fall within a recognized exemption to the hearsay rule, the resulting order may not be based solely upon the hearsay evidence."
- 10) "It is reasonable...to adopt a preponderance of the evidence standard...." Burke v. City of Anderson, 612 N.E.2d 559, 565 (Ind.App. 1993).
- 11) IC 4-32-12-1(a) provides in pertinent part, "The Department may suspend or revoke the license or levy a civil penalty against a qualified organization or an individual under this article for any of the following: (1) Violation of a provision of this article or of a rule of the department...(4) Commission of fraud, deceit, or misrepresentation."
- 12) IC 4-32-12-2 states, "The department may impose upon a qualified organization or an individual the following civil penalties:
 - (1) Not more than one thousand dollars (\$1,000) for the first violation.
 - (2) Not more than two thousand five hundred dollars (\$2,500) for the second violation.
 - (3) Not more than five thousand dollars (\$5,000) for each additional violation."
- 13) IC 4-32-12-3 states, In addition to the penalties described in section 2 of this chapter, the department may do all or any of the following:
 - (1) Suspend or revoke the license.
 - (2) Lengthen a period of suspension of the license.
 - (3) Prohibit an operator or an individual who has been found to be in violation of this article from associating with charity gaming conducted by a qualified organization.
 - (4) Impose an additional civil penalty of not more than one hundred dollars (\$100) for each day the civil penalty goes unpaid.

CONCLUSIONS OF LAW

- 1) The Department's investigation revealed that Petitioner leased the facility from Westwood Club, LLC with an option to purchase.

- 2) Each year, the annual licensing reports were simply filled out based on the prior year information regarding ownership of Petitioner's property. The Petitioner simply continued the same erroneous filing showing the Club still owned the property. This constitutes a misrepresentation of the facts, a violation of IC 4-32-12-1(a)(4).
- 3) The lease entered into by Petitioner does not make a distinction between the amount of rent attributable to the business operation and the operation of its charitable gaming activities.
- 4) The lease at issue requires that Petitioner pay a base rent of \$2,000 per month plus taxes, utilities, and maintenance a violation of IC 4-32-9-20.
- 5) Pursuant to 45 IAC 18-1-30, the term "Operator" means, "Any person who keeps records of the charity gaming event." Mr. Magee's spreadsheets were for his own edification as an investor who had loaned Petitioner a substantial amount of money and his actions do not rise to the level of an operator for the purposes of 45 IAC 18-1-30. Mr. Magee did not call bingo, nor did he sell paper, pulltabs, punchboards, or tipboards. He did not handle the money either during or after the nightly gaming events. Mr. Magee did not prepare the nightly summary reports nor did he manage or participate in the running of the charity gaming events.

PROPOSED DEPARTMENTAL ORDER

Following due consideration of the entire record, the Administrative Law Judge orders the following:

The Petitioner's appeal is denied in part and sustained in part. Petitioner's license to conduct charity gaming is suspended for two (2) years. The Petitioner is hereby liable for civil penalties in the amount of seven thousand dollars (\$7,000).

- 1) Administrative review of this proposed decision may be obtained by filing, with the Commissioner of the Indiana Department of State Revenue, a written document identifying the basis for each objection within fifteen (15) days after service of this proposed decision. IC 4-21.5-3-29(d).
- 2) Judicial review of a final order may be sought under IC 4-21.5-5.

THIS PROPOSED DEPARTMENTAL ORDER SHALL BECOME THE FINAL ORDER OF THE INDIANA DEPARTMENT OF STATE REVENUE UNLESS OBJECTIONS ARE FILED WITHIN FIFTEEN (15) DAYS FROM THE DATE THE ORDER IS SERVED ON THE PETITIONER.

Dated: _____

Bruce R. Kolb / Administrative Law Judge